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IN THE

Supreme Court of the ~~United States~~

NOV 13 2000

PGA TOUR, INC.,

Petitioner,

—v.—

CASEY MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ATP TOUR, INC. AND THE LADIES PROFESSIONAL GOLF ASSOCIATION, *AMICI CURIAE*, IN SUPPORT OF THE PETITIONER

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THE INTEREST OF THE *AMICI CURIAE*

ATP Tour, Inc. (the "ATP Tour") is the organizing and governing body for the circuit of men's professional tennis tournaments worldwide. The Ladies Professional Golf Association (the "LPGA") organizes, administers and governs the LPGA Tour, a tour of women's professional golf tournaments. In this respect, both the ATP Tour and the LPGA are similar to the PGA TOUR as that organization is the governing body in men's professional golf in the United States. The ATP Tour and the LPGA have an interest in how the Americans With Disabilities Act (the "ADA") is applied to professional sports competitions.[1]

The ATP Tour generally adheres to the rules of tennis competition promulgated by the International Tennis Federation ("ITF"). As with most professional-level athletic competitions, however, the ATP Tour has certain rules of competition of its own, and the ATP Tour reserves the right to depart from the rules of the ITF.

The ATP Tour administered over 190 professional tennis tournaments in 1999 at a variety of different sites throughout the world, consisting of 74 tournaments in its top categories, and an additional 116 entry-level events (known as its Challenger Series events). Members of the ATP Tour include most major tournaments (except for the Grand Slam events) and the very best tennis players in the world. ATP Tour events are considered to be tennis competition at its highest level.

The LPGA is the pre-eminent women's professional golf association in the world. The LPGA Tour consists of over 40 professional golf tournaments in the United States and several

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[1] Letters from each party consenting to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part or provided a monetary contribution to its preparation and submission. *See* Supreme Court Rule 37(6).

foreign countries. No other women's professional golf association has stature, participation, attendance or level of competition comparable to the LPGA.

The LPGA Tour generally adheres to the rules of golf competition promulgated by the United States Golf Association (the "USGA"). As with many professional-level athletic competitions, however, the LPGA Tour has certain rules of competition of its own, and the LPGA Tour reserves the right to depart from the rules of the USGA.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Ninth Circuit made two critical errors in the decision below. First, by concluding that Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA") requires courts to consider the relative importance of the rules of a professional sport, and to decide (on a case-by-case basis) whether a particular rule should be modified to accommodate the physical limitations of a disabled athlete, the Ninth Circuit ignored the most essential nature of all athletic competition — and especially professional level competition: athletic competition is based on nothing more than an agreed-upon set of uniform rules, all of which, in interplay with one another, define the game. At bottom, the singularity of a sports competition and the autonomy of its rules compel the conclusion that any court-imposed modification or abrogation of a rule of how the game is played changes its fundamental nature.[2] Such fundamental alteration is not required by the ADA.

Athletic competition is *supposed* to favor the more skilled and physically able. It is a test of who is the "best" at mastering the game as defined by its rules, and it is this characteristic that makes it compelling to both competitors and spectators. When courts begin to change the rules of how the game is played to assist a particular individual with a disability, this essential characteristic is vitiated. A competition judicially managed to eliminate this or that "unfairness" may appear more "fair" in the view of a court because less skilled or less able-bodied individuals may be able to compete, but it is not the same athletic competition envisioned by the creators and fans of the game. The fundamental fairness of the game — *i.e.*, that all the rules apply equally to all competitors — has changed, and we no longer have a competition that tests who is the 'best" at that particular game.

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[2] We are, of course, referring to those rules which affect play.

Second, the Ninth Circuit erred in concluding that the playing area of a professional golf tournament is a "place of public accommodation." The operative statutory language describes twelve types of "places of public accommodation" and a professional golf tournament does not fall within any of these categories. The two possibilities identified by the Ninth Circuit (*i.e.*, a place of "exercise or recreation" or a place of "entertainment or exhibition") simply do not apply. A golf course, when *used* for a professional golf tournament, is not being used as a place of "exercise or recreation." Certainly no competitor or spectator would consider the competition to be a form of exercise or recreation. To the extent a golf tournament is a place of entertainment, it is so only with respect to the places to which the public is permitted access (*i.e.*, the viewing areas, the bathroom facilities, the concession areas), not in the space where the athletic competition is waged. Simply because the sections of the course set aside for the gallery are open to the public does not render the competitive area where the public is not permitted (such as the playing area of an LPGA golf tournament, or the field of a professional baseball league, or the tennis courts at the National Tennis Center during the U.S. Open, or a bob-sled track during the Olympics) subject to the public accommodations provisions of Title III.

ARGUMENT

I. ANY ABROGATION OR MODIFICATION OF A SUBSTANTIVE RULE OF PROFESSIONAL ATHLETIC EVENTS WOULD FUNDAMENTALLY ALTER THE NATURE OF THE COMPETITION

The rules that a professional sports organization establishes for its competition are fundamental to the existence and definition of the sporting event. The dangers inherent in the Ninth Circuit's decision are most vividly seen by identifying examples of other "accommodations" that the courts might impose on professional sporting competitions in the name of advancing access by the disabled. Such a list might easily include, for example, reducing the height of the basket to

accommodate a short or even wheelchair-bound basketball player, giving a "head start" to a runner who has a circulatory condition in her legs that may lead to excessive cramping, increasing the length of rest periods between points or games to accommodate a tennis player who suffers from a heart condition or other disability that affects endurance, or even permitting a vision-impaired football player to touch an opposing lineman before the play begins in order to gauge his distance to the line of scrimmage. Indeed, the boundaries of such a list are as broad as the labyrinthian rules that define sport are complex. Nonetheless, the Circuit Court's decision paves the way for each such "accommodation," no matter how far-fetched the example might be, without any discernable limits or practically manageable standards.

The Court of Appeals may have intended that only those "rules of the game" that might be said not to fundamentally alter the nature of the competition be subject to accommodation and compromise, and may have believed that such a standard could be rationally implemented. But even so it erred, for that court's implicit belief that "there are rules and then there are *rules*" ignores four immutable, defining elements of all athletic competition.

First, every competition or "game" is, in the end, nothing but a set of manufactured rules, with each rule contributing to, and therefore defining, the nature of the competition. Who can recall, or even know, why bases are ninety feet apart? Who can explain why a tennis player who touches the net during play automatically loses the point? These are simply the rules, and the point, of course, is that *every* rule of athletic competition is, by definition, fundamental to *that* game, whatever that game might be.

Even though, or more accurately precisely because, every rule helps define the particular game, any change in any rule of competition must perforce fundamentally alter the nature of the competition. Change the size of the ball and the distance from the pitcher's mound to home plate and you no longer have

baseball — you have softball, or stickball, or something entirely different than professional baseball. Change the length of a Canadian Football League field from 110 yard to 100 yards to conform to the usual way "football" is played in the United States, and you may still have "football" in the generic sense of the sport, but you no longer have Canadian Football League football. And that of course is part of the majesty of sport; it is anything the designers of the rules want it to be, autonomous and, within its realm, sovereign. As such, each variation heralds a new form of competition, a new game.

Indeed, the rules of athletic competition are simply designed to provide a standard against which to distinguish among competitors. There is no "reason," for example, why the height of the net cord at center court during an ATP Tour tennis tournament must be exactly three feet; why a tennis court must measure precisely 78 feet by 27 feet; or why a tie-breaker is played at six games all in a set, and that the first player to reach seven, with a margin of two points, wins the tie-breaker. There is no reason why the size of the hole in a golf tournament must be 4 1/4 inches in diameter: it could be larger and make the skill of putting somewhat less critical in comparison to other skills in the sport. This is simply how the games are played, and what the games are. The rules may be changed, but then the game will be changed as well.

How many children are forced to create their own rules to accommodate the circumstances of the moment, as when the shape of the field, or the uneven number of players, or the lack of equipment forces them to imagine a new and different variation of the game they may have intended to play? What they devise is a new game played by different rules, no matter how much it might resemble another. For the same reason, whether a variation of a traditional game is more or less fair for the disabled athlete than the game it replaced, or, for that matter, more or less interesting to the public at large, is entirely besides the point. Respecting that simple proposition means

that any change to any rule of any game fundamentally affects the nature of the competition.

Second, every athletic competition is intended and designed to reward and favor the most able. In this sense, every "accommodation" to improve access to the competition by a would-be participant (whether disabled or not) or to adjust for different physical abilities is, by definition, a fundamental and material compromise of the competition itself.

To some, it undoubtedly seems "unfair" that few athletes are born with the natural athleticism of Michael Jordan, Pete Sampras or Karrie Webb. And it might seem particularly unfair that an athlete can prevail, or fail, in a competition (or be unable to compete altogether) because of inherited physical characteristics such as height or strength, or because of vastly different training opportunities (such as limited opportunities in the athlete's homeland). Yet by its very nature athletic competition does not seek to compensate for these inequities; to the contrary, it is precisely these inequities in abilities, and the testing of such disparate abilities *according to a uniform set of rules* defined by the governing sports organization, that is at the heart of competitive sport.

Third, only those charged by tradition or agreement with enforcing the rules of the game may amend them, else the game itself is fundamentally changed. Since the game is but a collection of its rules, it is, in the end, only what those in charge say it is. The "keepers" of the game must therefore have ultimate control over what does or does not affect the nature of the competition, much the same way an umpire or referee is, by tradition and agreement, the final arbiter of an on-field dispute. It is not so much whether the runner stealing a base was "safe at second," or whether the tennis ball hit the line, as whether the umpire thought it so. In other words, the rule-making is itself part of the game, and its impact cannot be measured by objective criteria (or even, in the case of the stolen base or the long forehand, by absolute truth). It is only the convention that

all will follow the same rules, determined by the same governing body, that gives meaning to the game.

Fourth, the integrity of every athletic competition depends entirely upon the uniform application of agreed-upon rules. The fairness of the event is determined not by "leveling the playing field" to encourage access by the many, but by ensuring that every competitor must play on the same field, however unlevel it might be, so that only a small few who possess superior physical and mental abilities will succeed against the common challenge. Fairness therefore dictates that there be no exceptions or accommodations, only the same rules for all.

Reduced to its essence, athletic competition is nothing more than an established set of rules applied equally to all competitors, who bring to the competition their own unique physical and mental attributes, training, and skills. The athlete whose unique personal characteristics happen to be superior to the other competitors, when measured by the established rules of the game, prevails in the competition.

By concluding that it is reasonable to abrogate a rule governing how professional golf is played in the PGA TOUR to accommodate a single competitor, and that such an abrogation would not fundamentally alter the nature of the competition, the Ninth Circuit ignored these most fundamental characteristics of professional athletic sports. Indeed, it is the singularity of the rules and the nature of athletic competition that renders professional sports entirely unique from public accommodations covered by Title III of the ADA (such as libraries, restaurants and museums), whose policies and procedures are incidental to, but not the essence of, the "public accommodation" itself.[3]

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[3] The examples provided in the Department of Justice's Technical Assistance Manual of the types of policies and procedures that may have to be modified confirm that such

(continued...)

Because it springs from a misapprehension of the nature of professional athletic competition, it is not surprising that the Ninth Circuit's decision defies rational implementation in two separate respects. First, the decision below would have courts evaluate the importance of a particular rule, when the essence of a game necessarily depends on the interplay of *all* the rules. It makes no sense to consider whether it is "important" that the net cord during a tennis tournament be exactly three feet from the ground at center rather than two, or whether it is "important" that a tennis court be 27 feet wide rather than 25, or the importance of a rule requiring a golfer to walk from one hole to another. Judges could of course change all of these rules, but then the competitors would have a different game — one that, if tennis or golf at all, is not ATP Tour tennis or PGA golf or LPGA golf.

Second, the decision below seeks to render more "fair" an aspect of competition that seems unfair — the personal characteristics that the athlete brings to the competition — by requiring an exception to a rule of the game that is otherwise applied uniformly, and fairly, to all competitors. But doing so vitiates the very essence of competition by seeking to make fair that which must be unfair (the different athletic abilities of the contestants), thereby making unfair that which previously was fair (the uniform application of rules). Subjecting an athletic competition to this sort of "tinkering" changes the fundamental characteristics of the competition. No longer is it a test of who is the most skilled or most able to perform that competition.

The Ninth Circuit's failure to appreciate fully the essential characteristics of athletic competition is nowhere more obvious

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[3] (...continued)

policies and procedures are not so closely identified with the fundamental purpose of the accommodation (*e.g.*, emergency evacuation procedures of a private health clinic, procedures for reserving motel rooms). Department of Justice Technical Assistance Manual § III-4.2100.

than in its conclusion that an "individualized inquiry" is necessary to determine, on a competitor-by-competitor basis, whether a relaxation or modification of a rule of the game for a disabled competitor would fundamentally alter the game, or give a particular disabled competitor an advantage. The court suggests, at least in the case of Casey Martin, that the walking requirement could be eliminated because Martin's disability was such that he would still be sufficiently fatigued by the limited walking he would have to do. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1001-02 (9th Cir. 2000). But the fact that Martin was substantially disadvantaged by application of this uniform rule is precisely the point: athletes who, for whatever reason, cannot perform as well as others when measured against the uniform rules of the game are not supposed to win! In fact, if their particular physical traits (*e.g.*, height, weight, strength, endurance) or psychological characteristics (*e.g.*, ability to concentrate, risk aversion, "mental toughness") create sufficient barriers, they may not be able to compete effectively at all. The "game" is designed to test for those characteristics and to make them outcome determinative, not to compensate for individual differences.

In the context of professional tennis or professional golf, the consequences of an "individualized inquiry" into the effects of altering a rule of play for a particular disabled athlete could have obviously prejudicial results. Would it mean, for example, that, depending on the results of an "individualized inquiry," a professional tennis player with a tendency to skin cancer could insist on playing only at night? Or that one with a heart problem might demand two minutes rather than 20 seconds between points to ensure that he can compete during a point at the same level of play as an able-bodied player? And how would it be possible to verify the "need" for the additional time at any particular point in the game? Would a player with a mobility impairment be permitted to cover a smaller court if he could demonstrate that he would have no advantage because it would be difficult for him to cover even the smaller court due

to his condition? Would a golfer with a motor control disability be entitled to putt into a larger hole if, because of her condition, her chances of sinking the putt were no better than other non-disabled professional golfers? The rationale of the Ninth Circuit would seem to require consideration of such accommodations notwithstanding the impossibility of rational implementation, the absence of judicially manageable standards, and the obvious impact such case-by-case changes would have on the competition itself.[4]

At bottom, the decision of the Ninth Circuit invites courts to create new athletic competitions that, in the court's view, give disabled athletes a better chance at competing. However laudable it might be for courts to create new sporting competitions, with constantly adapting rules so that disabled individuals might be able to compete more effectively, doing so is clearly beyond the intended scope of the ADA.

In the realm of professional sports, such an expansion of the ADA would be particularly devastating, inasmuch as a professional sport depends on its entertainment value for its very existence. Fans and spectators want to know who is the fastest, the strongest, the most able or the most skilled at a given competition. It is the unbiased and uncompromising determination of who is "the best" that fascinates the public, and gives professional athletics its significant entertainment value. No professional athletic competition attempts to compensate for the different physical abilities of athletes or gives a particular athlete a waiver or exemption from a substantive rule, and a professional sport that would attempt to do so would quickly jeopardize its entertainment value.

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[4] Such an approach is diametrically opposed to one of the explicit purposes of the ADA, which is to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2).

Accordingly, any modification of a rule of professional athletic competition would necessarily and fundamentally alter the nature of the competition and its entertainment value. The ADA requires no such result.[5]

II. THE COMPETITION AREA OF A PROFESSIONAL-LEVEL ATHLETIC EVENT IS NOT A "PLACE OF PUBLIC ACCOMMODATION" UNDER TITLE III OF THE ADA

The Ninth Circuit's conclusion that the playing area of a professional golf tournament is a "place of public accommodation" is plainly contrary to the ADA's statutory language and legislative history for the reasons articulated by the PGA TOUR, and as explained below.

Title III's definition of a place of public accommodation consists of a list of examples of places that are covered by Title III, followed in each case by a specification of the kind of activity or function included and a categorical inclusion of other places falling within that specification (*e.g.*, "A museum, library, gallery *or other place of public display or collection*"; "A park, zoo, amusement park, *or other place of recreation*"; "A gymnasium, health spa, bowling alley, golf course, *or other place of exercise or recreation*"). 42 U.S.C. § 12181(7) (emphasis added). The grammatical structure of this definition plainly indicates that the specific examples of "places of public accommodation" are just that — examples of what is described generically in the balance of the definition. Indeed, many places that are not specifically mentioned in the definition nonetheless qualify as places of public accommodation because

[5] Of course, a sports league or governing body cannot create rules that are in reality simply a pretext for invidious discrimination, but there are other provisions of Title III that would prevent such intentional and discriminatory exclusion (*e.g.*, 42 U.S.C. § 12181(b)(1)(A)(i)). No one disputes that the PGA TOUR walking requirement was not created for the purpose of eliminating potential disabled competitors.

they meet the qualitative, generic definition. *See* 28 C.F.R. Pt. 36, App. B at 622-23 (Preamble to Regulations on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Published July 26, 1991)).

Conversely, notwithstanding that they may be specifically identified on the ADA's list of public accommodations, places that are purely private in nature are not regulated places of public accommodation. For example, although a "library" is included on the list, a private library in an individual home is not a place of public accommodation because it is not a "place of public display." 42 U.S.C. § 12181(7)(H). Similarly, a private "hotel" with permanent residents is not a place of public accommodation even though "hotel" is on the list because a private hotel is not a "place of lodging" (which, according to the Department of Justice, suggests only short-term stays). *See* 28 C.F.R. Pt. 36, App. B at 623.

The critical issue is not whether a specific "place" is mentioned, but whether the "place" falls within the descriptive criteria set forth in the definition. It is the descriptive language that necessarily governs, and coverage therefore depends on application of a functional test focusing on the nature of the use of the facility, as contemplated in Congress's choice of language and the statutory structure.[6]

[6] The Department of Justice's guidance on Title III of the ADA is consistent with the view that it is the functional descriptions of places of public accommodations that determine coverage. In its Technical Assistance Manual on Title III, the Department explains that places of public accommodation include "Places of exercise or recreation (*e.g.*, gymnasiums, health spas, bowling alleys, golf courses)." Department of Justice Technical Assistance Manual § III-1.2000. Answering the question "Can a facility be considered a place of public accommodation if it does not fall under one of these 12

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Among Title III's definitions of a "place of public accommodation" is "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." 42 U.S.C. § 12181(7)(L). To fall within this type of "place of public accommodation," a place must necessarily fall within the descriptive part of this definition, *i.e.*, it must be a "place of exercise or recreation." Thus, public tennis courts, beaches, swimming pools, playgrounds and video arcades would fall within this definition to the extent they satisfy the functional definition (*i.e.*, to the extent they are places of exercise or recreation). *See* H.R. Rep. No. 116, 101st Cong., 1st Sess. at 59 (1989) (Senate Committee on Labor & Human Resources). However, to the extent a gymnasium, health spa, bowling alley, golf course (or for that matter a tennis court, swimming pool or beach) is not *used* as a place of exercise or recreation, it is not a place of public accommodation.

Under this functional test, the competition area of a professional golf tournament is quite obviously not a place of exercise or recreation — certainly no participants in the competition would view themselves as engaging in exercise or recreation as those terms are ordinarily understood, nor would a spectator or fan have such an impression. Although golf courses are places of public accommodation *when used as places of exercise or recreation*, on those occasions where the course is used for some other purpose such as a competition with highly selective participation criteria, the playing area of the course itself is not a place of public accommodation, although the public gallery may be. Similarly, although public tennis courts are generally used by the public for exercise or recreation, when a court is used for another purpose, such as a

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[6] (...continued)
categories?", the Department's guidance responds "No, the 12 categories are an exhaustive list. However, within each category the *examples* given are just illustrations." (*Id.*) (emphasis added).

professional competition, it is not being used for exercise or recreation and is therefore not a place of public accommodation.

The fundamental error made by the District Court and the Ninth Circuit in interpreting the definition of Title III is to have ignored the functional test required by the descriptive language in the relevant definition of place of public accommodation (*i.e.*, a "place of exercise or recreation"). The courts below improperly focused solely on the fact that a "golf course" is specifically included as an example of a place of exercise or recreation, ignoring the statutory functional test for determining what qualifies as a place of public accommodation. By taking the "examples" as the end of the statutory analysis without taking account of the full statutory provisions which include a specification of the *kinds* of places or activities to be regulated, the courts below simply misread and misapplied the statute. For the reasons set forth above, the courts below applied an incorrect interpretation of the statutory language, one with no warrant whatsoever in the legislative history.

Nor does the Ninth Circuit's alternative holding that a professional golf tournament is a place of public accommodation because it is a "place of exhibition or entertainment" support the conclusion that the actual playing area of the competition, where the public cannot go, is covered by Title III. That argument extends at most to the public areas of the tournament, *i.e.*, those areas from which the public views the exhibition or entertainment (and the public restrooms, concession areas and other facilities serving the public), but not to those areas where the public is not permitted — the playing-field, or tennis court. The plain statutory language and its functional test to determine coverage under Title III compels this result. The parameters of a "place of exhibition or entertainment" are necessarily limited to those aspects of the facility that are used by the public for exhibition or entertainment. *See Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 n.5 (11th Cir. 2000) (while "a cruise ship contains some public accom-

modations [,]that does not mean that the entire cruise ship necessarily is subject to Title III"); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 482 (D.N.J. 1998) ("Mere operation of one place of public accommodation does not by itself subject every other aspect of the operator's business to Title III").

The public does not use the stage of a theatrical performance, or the playing area of a sports competition, for entertainment, but rather uses the public spectating areas, and the ADA has no application in determining what plays will be performed, what scenery used, or what scenes cut — any more than it regulates what rules of competition must be changed. Similarly, although the public areas of a museum or gallery would be a place of public accommodation, the private areas of the museum (*e.g.*, the office and storage areas, and the gallery walls where art is hung) are not "places of public accommodation" subject to the ADA; the ADA no more regulates what art will be purchased or stored, or whether brighter paintings must be acquired or darker ones moved for particular viewers, than it regulates the rules of professional sports competitions. *See* 28 C.F.R. Pt. 36, App. B. at 614-15 (1997). *See also Louis v. Ideal Cleaners*, Nos. C-99-1557, C-99-1814, 1999 U.S. Dist. LEXIS 19811 (N.D. Cal. Dec. 14, 1999). So too, a public tour route of a factory would be a place of public accommodation (because it is a place of exhibition), but not the areas that the public is not permitted — even if the public is able to view the other areas that are not covered. *See Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998), *aff'd*, 212 F.3d 1159 (9th Cir. 2000).

This analysis is supported by the rules promulgated to implement the ADA: the published regulations that pertain to places of entertainment or exhibition such as stadiums, theaters and concert halls focus on the public areas of these facilities, not the places to which the public does not have access (*e.g.*, the stage or the backstage area). *See* 28 C.F.R. § 36.308 (1999) (application of Title III to seating in assembly areas). This is

entirely consistent with the overall purpose of Title III of the ADA which was to insure that "public" spaces are accessible to the disabled — not to regulate the entirely private areas and activities to which the public does not have access. *See* 28 C.F.R. Pt. 36, App. B at 616.[7]

To accept the Ninth Circuit's conclusion, unmoored to the statutory text, that if a facility is deemed to be a place of entertainment or exhibition, then *all* aspects of the facility are places of public accommodation, would effect a dramatic expansion of the scope of Title III for which there is no warrant in the statutory language or in its lengthy legislative history. It would mean, for example, that *all* aspects of museums, stadiums, and theaters — back offices, storage areas, decisions about what scenery to use or where to place it — would be covered under the public accommodation provision of Title III. But these areas clearly do not fall within the functional definition a place of public accommodation (*i.e.*, they are not places of entertainment or of retail sales).

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[7] The Preamble to the Title III regulations provides:

> Section 36.102(b)(2) emphasizes that the general and specific public accommodations requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. This distinction is drawn in recognition of the fact that a private entity that meets the regulatory definition of public accommodation could also own, lease or lease to, or operate facilities that are not places of public accommodation. *The rule would exceed the reach of the ADA if it were to apply the public accommodations requirements of subparts B and C to the operations of a private entity that do not involve a place of public accommodation.*

28 C.F.R. Pt. 36, App. B at 616 (emphasis added).

The expansive interpretation of Title III adopted below is contrary to the functional statutory test for determining what qualifies as a place of public accommodation. Moreover, it would represent an unprecedented governmental incursion into the rules for and management of professional sports competition previously left to the unfettered judgments of the professional sports leagues and sanctioning bodies. If Congress had meant to make professional sports competitions subject to the ADA in the way the Ninth Circuit has, surely it would have said so, and the legislative history would have so reflected.

Accordingly, for these reasons and the reasons articulated by the PGA TOUR, the Ninth Circuit erred in concluding that a professional golf tournament is a place of public accommodation.

CONCLUSION

For the reasons expressed above, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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